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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE JAMES DONATO

IN RE: GOOGLE PLAY STORE)
ANTITRUST LITIGATION) No. 21-2981 JD
)
) San Francisco, California
) Thursday, December 16, 2021

TRANSCRIPT OF ZOOM VIDEO CONFERENCE PROCEEDINGS

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Thursday - December 16, 2021

11:04 a.m.

P R O C E E D I N G S

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THE CLERK: Calling multi district litigation
21-2981, In Re Google Play Store Antitrust Litigation.

Counsel for the plaintiffs, please state your name for the
record.

MS. NAM: Good morning. Hae Sung Nam, Kaplan Fox,
for the consumer plaintiffs.

MS. GIULIANELLI: Karma Giulianelli from Bartlit Beck
also for the consumer plaintiffs.

MR. GLACKIN: Brendan Glackin from the Office of the
Attorney General of the State of Utah. I'm representing the
State of Utah in the multi state.

MS. MOSKOWITZ: Good morning, Your Honor. Lauren
Moskowitz from Cravath, Swaine and Moore on behalf of Epic
Games.

MS. COOLIDGE: Good morning. Melinda Coolidge behalf
of developer plaintiffs.

MR. KELLY: Good morning, Your Honor. Eamon Kelly
also on behalf of the developer plaintiffs.

MR. HARRINGTON: Ben Harrington of Hagens Berman also
for the developer plaintiffs.

THE COURT: Okay. Who is next? Defendants.

MR. ROCCA: Thank you, Your Honor. It's Brian Rocca

1 of Morgan Lewis representing Google defendants.

2 I have two colleagues joining me today, one of whom is
3 making his first appearance. Mr. Pomerantz and his colleagues
4 at Munger Tolles recently joined the MDL party on the Google
5 side, and I'd like to introduce Mr. Pomerantz first.

6 **MR. POMERANTZ:** Good morning, Your Honor. It's nice
7 to join this case team.

8 **MR. BRADSHAW:** And good morning, Your Honor. Ben
9 Bradshaw from O'Melveny and Meyers also for the Google
10 defendants.

11 **THE COURT:** Okay. Well, let's dive in. Let's just
12 consider, Defendants, are there objections to amending the
13 developer and consumer complaints; right?

14 **MR. POMERANTZ:** We don't have any objections
15 providing that the discovery milestones that had been agreed
16 upon are part of the overall agreement. With that one
17 qualification, we have no objection.

18 **THE COURT:** Okay. Consider those granted. So go
19 ahead and -- you have to file them as new ECF entry, so just do
20 that.

21 **MR. POMERANTZ:** Your Honor, I don't mean to
22 interrupt, but if we could -- I know that, therefore, our
23 answer may be due during the holidays. I don't think there
24 will be any controversy about the answer either.

25 If we could just have til, you know, some date in January

1 to file our answers, that would be helpful.

2 **THE COURT:** That's fine. You're using the word
3 "answer," I'm assuming that's deliberate? It's going to be an
4 answer?

5 **MR. POMERANTZ:** Yes, Your Honor.

6 **THE COURT:** Okay. You all work out a date, and I'm
7 sure the plaintiffs will be reciprocal in the professional
8 courtesy that you all showed on the defense side to amendment.
9 So you all work that out.

10 And now, let's talk about the dates. Your schedule is a
11 little chaotic. I'm not going to -- we will extend dates, but
12 we're not going to do it the way you've proposed. This is the
13 Exhibit A you've attached to Docket No. 159.

14 Let me just call out a couple thing. I'm not going to do
15 a class cert hearing and hot tub on the same day. That makes
16 no sense. So you've got to work that out. Right now you have
17 this very odd summary judgment following Motions in Limine,
18 which makes no sense to me whatsoever. So you have to work
19 that out.

20 And I don't know what you want to do about the trial date,
21 but I am not going to hear dispositive motions on
22 September 22nd for a trial that starts less than four weeks
23 later. So you all need to go back and work something out.
24 Okay? The work-out is not just throw it on the judge's desk
25 and let him figure it out. That's not the work-out. Okay? So

1 don't lard me up with *Dauberts*, dispositive motions, Motions in
2 Limine, you know, three weeks before trial. It's just --
3 that's not going to work. Okay?

4 So your top priority is to give the judge the time and the
5 space to get his work done so that he can serve your needs. So
6 make sure you build that in.

7 So just you all work that out. Just file something
8 whenever you file it.

9 Now, there are a really large number of disputes. I'm
10 just going to give you some guidance and then you can work on
11 it over the holidays.

12 For the disagreements about the document preservation, let
13 me -- Plaintiffs, you just serve interrogatories on the
14 defendant. Okay? And you pose all those questions you asked
15 on Page 8 and Page 9 as interrogatories and we'll take it from
16 there. So those will be sworn responses, and that will be the
17 better way to go.

18 You can probably shorten time on those. I don't think you
19 need to wait, you know, a huge amount of time. So, you all
20 have the issue teed up. Google knows what's coming.

21 So, you know, how about a two-week response date,
22 Mr. Pomerantz?

23 **MR. POMERANTZ:** I'm not sure about the holidays. If
24 we could have til the end of that first week of January.
25 Assuming they are going to serve them, like, tomorrow or today,

1 I would ask for that end of that first week of January.

2 **THE COURT:** That seems fine. What date is that? Is
3 that the 7th or something?

4 **MR. POMERANTZ:** I should have that in front of me,
5 but I don't. I think that's right, Your Honor.

6 **THE COURT:** You and me both. I don't have it either.

7 **MS. MOSKOWITZ:** January 7th is that Friday.

8 **THE COURT:** Wow, we have a calendar savant. Okay.
9 January 7th it is.

10 **MS. GIULIANELLI:** This is Karma Giulianelli, Your
11 Honor. I do have a couple of questions with respect to these
12 interrogatories.

13 I'm assuming that they will be additional interrogatories
14 and they won't count against the number that we have.

15 **THE COURT:** Yes. This will be a side set.

16 **MS. GIULIANELLI:** Okay.

17 **THE COURT:** Just for document preservation purposes.
18 And just do -- just take what, eight or nine. Okay? Nothing
19 more. This is not an opportunity to serve 30 more requests on
20 Google. So just take, you know -- if you want to fine tune
21 them, that's fine. I don't have a problem with that, if you
22 want to fine tune them, but don't lard on, you know, another
23 dozen on top of what you have.

24 **MR. POMERANTZ:** Your Honor, if I may request, as we
25 were getting ready for this hearing, we were also looking at

1 some of the preservation issues on -- for Epic in particular,
2 but also the other plaintiffs. And we didn't think this was
3 appropriate to raise with Your Honor, but they chose to.

4 We would just ask that we could also serve similar
5 interrogatories on them so that the preservation issues can be
6 fleshed out and, if necessary, presented to Your Honor.

7 **THE COURT:** I think that's just fine. Can you serve
8 them in the same time frame? Next day or two?

9 **MR. POMERANTZ:** Yes, Your Honor. Yes, Your Honor.

10 **THE COURT:** We'll just have a little -- we'll take a
11 little side spur here on the railroad to trial and you all just
12 get all this done. Okay? So that takes care of that.

13 And then -- oh, just one second.

14 (Brief pause.)

15 **THE COURT:** What's the next issue?

16 **MR. POMERANTZ:** The proper construction of your order
17 regarding 30(b)6.

18 **THE COURT:** Oh, 30(b)(6). Yes. So what is the
19 problem? I'm not really following what's happening.

20 **MR. POMERANTZ:** Your Honor, this is Glenn Pomerantz,
21 if I may.

22 I think it's really just a question of whatever Your Honor
23 intended by the order. Your order said that each plaintiff
24 group may designate up to ten topics.

25 The question is whether that allows the plaintiffs to get

1 together and collectively designate 40, so they all can
2 question on all 40, or whether each of them have to designate
3 whichever ten topics they want.

4 We would request the latter interpretation because
5 otherwise each of the plaintiffs get 40 topics against Google,
6 but we only get ten topics against Epic or any of the other
7 plaintiff groups.

8 We understood that what Your Honor had in mind was that
9 Epic could pick ten topics and the states could pick ten
10 topics. And if they each want to question on the same topic,
11 they can both include that in their list, but that they
12 wouldn't each get the opportunity to basically collectively
13 work together to question on 40 topics.

14 That's how we understood Your Honor's order. I think the
15 plaintiffs disagree with that.

16 **MS. MOSKOWITZ:** Your Honor, if I may. Lauren
17 Moskowitz on behalf of the plaintiffs here.

18 Google already lost the battle of trying to limit how many
19 30(b)(6) topics. Therefore, Your Honor ordered ten per
20 plaintiff group. That's 40.

21 So Google has to prepare its witnesses to testify on up to
22 40 topics. We have served that notice. We've already had
23 meet-and-confers on those topics.

24 Nothing about this dispute is going to change how many
25 topics. All they are trying to do is impose constraints on who

1 asks questions and how that testimony on those topics is going
2 to be used. That's completely antithetical to the fact that
3 we're in a coordinated MDL process with a coordination order.

4 We're all sharing ten hours with Google witnesses. All
5 discovery is being produced in all cases. That goes for
6 documents, interrogatories, depositions. They are trying to
7 use coordination both as a sword and a shield.

8 We -- they already have the protection. Your Honor said
9 we have to try to cover all of the 30(b)(6) testimony within
10 the same time that the 30(b)(1) testimony is going to happen.
11 That's ten hours, because we're all noticing these witnesses
12 together.

13 And so it's already in our interest to coordinate. We're
14 taking a lot of effort on our side to coordinate who has the
15 lead. Just last week I was in a deposition. I did seven of
16 the hours on behalf of all the plaintiffs and only one other
17 plaintiff asked questions. If they had designated that witness
18 as a 30(b)(6), I -- even if I hadn't served the notice, I
19 probably would have taken the lead because there's presumably
20 going to be some overlap.

21 So the notion that there is any inefficiencies created by
22 this or any prejudice to Google by letting the plaintiffs do
23 their coordination that we're already doing, to ask questions
24 and prepare to ask questions within the time we have, we are
25 being efficient. We are coordinating, and we are doing this

1 the right way.

2 The other aspect is Google trying to limit for which case
3 this is going to count as 30(b)(6) versus 30(b)(1)? That
4 doesn't make sense either. We're coordinated. In fact, we may
5 end up consolidated. Your Honor has already flagged that you
6 want to hear about that.

7 So the notion that any of this testimony is going to be
8 used differently in one of the cases versus the other just
9 makes no sense, and that's completely against the spirit of
10 what we're trying to chief in this coordination order.

11 So we have four sets of plaintiffs asking consolidated and
12 coordinated questions in these depositions. Adding 30(b)(6)
13 topics does nothing to Google, and we are working really hard
14 to coordinate.

15 So it just seems actually inefficient and potentially
16 confusing and prejudicial to the plaintiffs if we have to try
17 to navigate and tag team and switch off.

18 And what if Google actually designates one witness for
19 three topics that were served by three different plaintiffs?
20 Do we have to switch on and off and reask questions that might
21 be relevant to each topic? It seems like it creates a lot of
22 inefficiencies. They already have the protection they need in
23 the hours limits.

24 **THE COURT:** Well, look. This was really meant to be
25 a common pool. You're all going to dive in and swim around and

1 all the information is shared.

2 As far as I'm concerned, the main limits are the number of
3 topics and the number of hours and, you know, within that
4 anybody can do whatever they want.

5 Now, I don't think this is the issue, but I'll just be
6 clear about this. We're not going to have multiple lawyers
7 asking the same question. That's not going to be an efficient
8 way to do things. But short of that, whatever the plaintiffs
9 want to do seems fine.

10 I mean, Mr. Pomerantz, it's not really -- I don't see how
11 that's a burden for Google.

12 **MR. POMERANTZ:** Your Honor, listen. We will defer to
13 Your Honor. This is not one to go to the mat on.

14 I would just simply say that I know that when three
15 different lawyers ask questions, even if they are not asking
16 the same questions, it takes more time. It just takes more
17 time.

18 **THE COURT:** That time is coming out of the
19 plaintiffs' budget. So if anything, you should celebrate the
20 administrative inefficiency that eats up your exam time.

21 **MR. POMERANTZ:** Your Honor, we're ready to move on to
22 the next issue.

23 **THE COURT:** Okay. All right. So that settles that.

24 Privilege logs. What is -- so, you know, I have a
25 standing order on privilege logs. I hope you all looked at

1 that because that is going to govern how I handle privilege
2 logs. I'm not sure what the problem is here, Plaintiffs.

3 **MR. POMERANTZ:** Your Honor, it's actually somewhat of
4 an unusual issue. And it goes -- I think it's tied to the
5 stipulation the parties submitted, at least that's what the
6 plaintiffs have said, regarding privilege logs.

7 And there is a sentence in that, a paragraph in that
8 stipulation that says:

9 "A party who reproduces documents from other
10 matters, in satisfaction of its discovery obligations
11 in this litigation, may also produce the associated
12 privilege logs to satisfy their obligations; and then
13 if they do that, they have the burden to substantiate
14 their claims, the privilege claims."

15 That's not at all what's happening with the particular
16 logs at issue here. So let me just explain briefly.

17 Plaintiffs have served hundreds of document requests.
18 Google has responded. We've worked with them. We've figured
19 out custodians and search terms and date ranges. And then we
20 produced those documents, I think it's about 1.6 million, and
21 then we also provided a privilege log. And it had thousands
22 and thousands of entries.

23 And we have been engaged with the plaintiffs on a lot of
24 back-and-forth -- none of which, I think, had to come to Your
25 Honor; they were all resolved -- about various entries on those

1 privilege logs. None of that is raised by the issue raised in
2 this status conference report.

3 What's raised here was that separate from all of that,
4 Your Honor ordered us to produce documents that had previously
5 been produced in two different matters. One was the *House*
6 *Judiciary Committee* and the other was a case called, I think,
7 *Callsome*. And you said produce the documents that you produced
8 in those cases, and that's what we did.

9 Now, in those other matters there were privilege logs.
10 And we gave those privilege logs to the plaintiffs, at least
11 the relevant portions of those privilege logs, but those --

12 **THE COURT:** You withheld the same documents. In
13 other words, it was a mirror image production. You turned
14 over --

15 **MR. POMERANTZ:** No, no.

16 **THE COURT:** -- to the plaintiffs whatever you
17 produced in the other cases and you withheld the same things.

18 **MR. POMERANTZ:** Yeah. And those other cases, by the
19 way, like the *House Judiciary Committee* had different date
20 ranges, different custodians, different issues. I mean --

21 **THE COURT:** I understand. You took the relevant
22 file from those other productions, but the point is you
23 asserted the same privilege objections in this case that you
24 did in the other contexts.

25 **MR. POMERANTZ:** Well, they are asking us to

1 substantiate privilege log entries on those other logs that are
2 for documents that have nothing -- that are not part of the
3 logs in this case because they weren't from a custodian and a
4 date range and a search term.

5 **THE COURT:** Oh, you're saying that you didn't produce
6 things on relevance grounds and they want a privilege log for
7 those non-produced documents?

8 **MR. POMERANTZ:** No, not quite. No, no. I'm sorry.
9 I'm not being clear.

10 We gave them privilege logs for, let's say, the *House*
11 *Judiciary Committee*. Some of those documents on the privilege
12 logs were also on our log in this case. Because we separately
13 reviewed them, we determined they were privileged, and we put
14 them on our log in this case.

15 Some of the entries on the *House Judiciary Committee*
16 privilege log are not on our privilege log in this case because
17 they were not responsive to anything that the plaintiffs asked
18 for in this case.

19 They are asking us to substantiate those log entries that
20 were not at all responsive to any of the requests in this case.
21 And we don't even think in the first instance we had any
22 obligation to give them these privilege logs because all we
23 were ordered to do was give them the documents that were --

24 **THE COURT:** Let me just jump in. I have no idea
25 what's happening here. What is it you want me to do? Who is

1 raising the privilege issue?

2 I'm completely befuddled by what we're talking about. Who
3 raised this? Who put this in here? Is this a plaintiff thing
4 or defendant thing?

5 **MS. COOLIDGE:** It's a plaintiff thing that was --

6 **THE COURT:** Tell me what the problem is. What is the
7 issue you're having a problem with?

8 **MS. COOLIDGE:** So we received these privilege logs,
9 and like we do with all privilege logs, we look at them and we
10 determine: Can we tell why a document is privileged? Do we
11 need to challenge that?

12 Putting aside the privilege logs that were produced from
13 new documents in this case, like Mr. Pomerantz said, we have
14 made it through those. We raised the same kind of issues with
15 this reproduced privilege log. And we said, you know, there is
16 300-some documents on here. We can't tell why they are
17 privileged. Can you tell us why? And they said no. And they
18 say in -- in their entry in the status report that it seems
19 that they cannot determine why they were withheld as privileged
20 in that case.

21 And I also just want to say these -- the documents on the
22 log are responsive to our requests in this case --

23 **THE COURT:** Okay. You know what? You need to go
24 back to the well. This is -- this is needlepoint that I am a
25 million miles away from, and I don't have any idea what you

1 guys are talking about.

2 So you go back to the well and meet-and-confer. You send
3 me a discovery letter and -- by the way, that goes for the
4 interrogatory issue that Epic raised as well. Don't do these
5 in case management conference statements. Send them in a
6 discovery letter. All right?

7 This is not a case management issue where we have to have
8 everybody involved. Just send me in your discovery letter.
9 Make sure it adheres to my guidelines. Follow those to the
10 letter. And I'll take it from there. All right?

11 Now, when are you going to get a new schedule to me?

12 **MR. POMERANTZ:** If I could just clarify. When you
13 say the Epic interrogatory, that's the issue we raised at the
14 end. You want us to treat that through the letter brief
15 process.

16 **THE COURT:** All discovery issues should not be --
17 should be presented in my -- in the usual course of business
18 under my standing order for civil discovery disputes. Not in
19 case management statements.

20 **MR. POMERANTZ:** Understood.

21 **THE COURT:** Now, look. Let's just -- I want to be
22 realistic here. I'm just proposing this as a concept. If this
23 October 17th trial date is not workable because you need more
24 time, let's get that discussion going.

25 Now, is that what you're edging towards here? Is that

1 sort of the -- nobody wants to tell the old judge move the
2 trial date, but I'm opening the door for you.

3 Is that the issue, Mr. Glackin?

4 **MR. GLACKIN:** Good morning, Your Honor. Brendan
5 Glacklin, State of Utah.

6 I think in terms of us figuring this out, a question for
7 some plaintiffs is going to be does moving the trial date --
8 does Your Honor's schedule accommodate moving the trial date a
9 short amount of time and still completing a trial in a
10 reasonable way given the holidays at the end of 2022, or does
11 moving the trial date mean moving it into 2023?

12 I think that would be a relevant question for the
13 plaintiffs -- at least the plaintiffs and probably also Google
14 in terms of --

15 **THE COURT:** That's a good question. Let's just think
16 out loud here. This is a non-binding discussion and nothing is
17 going to be held against anybody, least of all me. So don't
18 write back and say: Oh, you know, Judge, you said X. This is
19 all -- we're talking among friends here.

20 First, let's just ballpark. This just a non-binding
21 estimate, but plaintiffs -- look, I don't know yet and you
22 don't know yet, I don't think -- I certainly don't know yet --
23 whether this is going to be a single consolidated trial for
24 everything.

25 However, it appears to me at this vantage point that the

1 issues are substantially overlapping in almost every respect.
2 So I don't know yet how that's going to look. So let's just
3 leave that as a placeholder and not decide.

4 Just thinking abstractly about a trial, it seems to me
5 that this is a case that probably would take about three trial
6 weeks. All right? And I do, you know, about seven hour trial
7 days. So, and I set time limits. And I will just tell you
8 that in -- I just finished a multi district litigation
9 antitrust case. Nobody ever uses all their time. So that's
10 really my starting point. That has been a 100 percent true
11 empirical experience. So three weeks as a concept seems about
12 right.

13 Now, does anybody on the plaintiffs' side think that's not
14 right?

15 **MS. GIULIANELLI:** Your Honor, this is Karma
16 Giulianelli.

17 As a concept, that generally sounds right, although I do
18 note that some of it will depend on the structure of the trial
19 because we do have -- while there is some overlap between
20 Epic's claims and the claims of consumers and even developers,
21 there are some disparate issues that relate to Google and Epic.

22 **THE COURT:** I understand. I understand.

23 **MS. GIULIANELLI:** So it depends on Epic issues.

24 But I would think three or four weeks, depending on
25 whether Epic is -- whether a trial with everybody. Because

1 there are some issues that are specific to Epic and it's
2 contractual dispute with Google. And then we have damages
3 issues, which Epic does not.

4 **THE COURT:** Well, as I said earlier, no matter what
5 happens, we're doing the trial -- jury trial issues first.
6 Everything -- all the equitable issues are going to follow
7 that.

8 **MS. MOSKOWITZ:** And, Your Honor, if I may add one
9 edification of some things, some developments since we had that
10 conference where you did make that statement.

11 As of right now Google has launched counterclaims against
12 Epic and has demanded a jury trial. And then there is overlap
13 with -- our defense to their counterclaim is based on some
14 illegality of the contract, which does overlap with their
15 affirmative claim.

16 So as of right now, the Epic case, even standing alone,
17 again, looking at it today is a jury trial. And so there could
18 be a set of facts under which if class certification processes
19 needed more time and you wanted to sort of follow the
20 *Capacitors* and do all class cert and all merits and sort of
21 follow that track, that that could be done. We could split off
22 after fact discovery that we're all coordinating and allow Epic
23 and Google to go to trial, sort of like what Google and Epic
24 were originally proposing back in May, a jury trial on
25 schedule, on October, as -- with the schedule as it already is,

1 without crunching, Your Honor, any of those times, and then
2 allowing all of the rest of the cases to go off and follow the
3 more ordinary course, again, *Capacitors*-like schedule. And
4 then you're still having two jury trials in that, which is less
5 than, I think, perhaps ideal, but it would not usurp the jury
6 role --

7 **THE COURT:** I don't understand how that could
8 possibly work.

9 Now, you brought the exactly same antitrust claims that
10 every other plaintiff brought. Why would I ever try that
11 separately? What if the jury in your case said no, there had
12 been no antitrust violation? And then Google has to go through
13 it again as if that never happened? That doesn't make any
14 sense. That's the whole point of what I'm talking about.

15 We're not going to do that. All right? We're not going
16 to have people going off on core coordinated antitrust issues
17 as if the other person in the room doesn't exist. That was the
18 message from last time. So, please, put that out of your mind.
19 That's not going to happen.

20 Now, let me ask the defendants. I know there are a number
21 of variables, but, I mean, three trial weeks seems like a
22 workable amount to me.

23 Don't you think, Mr. Pomerantz?

24 **MR. POMERANTZ:** Your Honor, in a non-binding way I
25 agree. Again, it sounds to me within the ballpark.

1 **THE COURT:** Okay. Now, I'm just going to use this
2 most recent case because the timing is quite similar. So I
3 started that case the Monday after Thanksgiving, and we -- you
4 know, we finished Monday.

5 Now, that did finish with a settlement, but it had plenty
6 of time. We were going to close two days ago and then the jury
7 would have had plenty of time before holidays to reach a
8 verdict.

9 I am, as most judges are, and I'm sure you are, too,
10 highly reluctant to have holidays intervene in the presentation
11 of evidence and certainly deliberations.

12 Now, there are a number of schools of thoughts about what
13 juries do on December 24th if they happen to be deliberating.
14 We don't need to get into those. But I'm not comfortable
15 having that be an issue.

16 So to Mr. Glackin's point, I can push this out, you know,
17 a month. We could start right -- the Monday after Thanksgiving
18 and see if we can get it done.

19 **MS. MOSKOWITZ:** Your Honor --

20 **THE COURT:** The question is for you to think about.
21 This is a take-away project. We're not resolving this now.
22 This is a take-away project.

23 If we want to do this in 2022 -- and I'm not going to ask
24 anybody to say why they want that done. That's fine with me.
25 I don't have a problem with that. If you want to do it in

1 2022, we could probably start as late as the Monday after
2 Thanksgiving. I don't know when Thanksgiving is in 2022, maybe
3 it's earlier. This is an unusually late one.

4 **MR. POMERANTZ:** Your Honor, November 28th is the
5 Monday after Thanksgiving.

6 **THE COURT:** All right. Basically the same.

7 And we could conceivably finish the main -- I'll just call
8 it the main trial before December 25th.

9 If that is not going to be enough time to move around
10 everything else without crunching me in a barrage of motions,
11 then it will be first quarter of 2023.

12 So I'll let you all talk about this. Okay? My only
13 suggestion, my only point is I have now opened the door to you
14 to consider moving October 17 as the trial date. Okay? So you
15 now have permission to talk about that.

16 **MS. GIULIANELLI:** Your Honor, you asked about the
17 timing, about when we might get you a proposed schedule.

18 **THE COURT:** Yes.

19 **MS. GIULIANELLI:** We also were supposed to, if I
20 recall, get you some sort of a proposal on trial structure. So
21 we understand your admonition on the joint jury trial -- the
22 overlapping issues, but it might make sense to commit to get
23 you, if we know the class cert dates are going to be moved per
24 our proposal, but the overall remainder of the schedule in
25 January so that we have time to get you -- to ponder these

1 issues of trial structure.

2 **THE COURT:** Well, I think that's a fine idea. Now
3 the pleadings are effectively closed. These amendments are
4 just adding a party. They are not going to change anything
5 dramatically; right?

6 **MS. GIULIANELLI:** Correct.

7 **THE COURT:** Is that right, Mr. Nam?

8 **MS. NAM:** Yes, Your Honor.

9 **THE COURT:** Okay. So the -- and then the counter
10 claims, everything is done. So now, this is a good time for
11 you to have a conference. Why don't you do it soon and, you
12 know, maybe even start talking early next week. Take a little
13 break or whatever you plan to do and then get back to it.

14 How about by January 14th, you get a master proposal to
15 me, a vision, a trial vision, what you would envision the
16 trials to look like and that also takes into account any
17 equitable issues that I'll have to deal with on my own, which
18 will come after the findings of fact by the jury, and trial
19 times.

20 I mean, to be honest with you, very, very unlikely to give
21 you more than 20, 25 hours per side. Okay? That's going to
22 be -- just take that as a working figure. I have tried equally
23 large cases in less. So just think about that as an operating
24 figure. I'm not -- I'm not closing the door to more than that,
25 but that's likely to be the range. And whether you want to do

1 that -- you know, try to jam in it between Thanksgiving and
2 Christmas holiday next year or you want to do it, you know,
3 first quarter of 2023. Okay?

4 **MS. MOSKOWITZ:** Your Honor, may I ask one question?

5 **THE COURT:** Of course, yes.

6 **MS. MOSKOWITZ:** Not crunching you. The schedule as
7 it is I think is about two months before the trial date that
8 the dispositive hearing and concurrent expert proceeding is
9 currently set. The Motions in Limine, I think, they are just
10 tethered to your normal counting backwards from the trial.

11 Is two months around what you would want us to shoot for
12 in terms of when you would like to have the dispositive motion
13 hearing?

14 **THE COURT:** Look, yes. If you study my docket, and
15 the day may come when you will, *Capacitors* is a good model just
16 because it's another large antitrust action.

17 You know, the hot tub really, in my view, is where I
18 decide all the *Daubert* issues. Okay? So, you know, it's not
19 that -- it's immensely helpful to me. It's been remarkably
20 productive for me to have the hot tubs, and they have been
21 very -- they have been directly translated into my *Daubert*
22 decision.

23 So typically the *Daubert* decisions, orders that I issue
24 are not going to be all that late in the process because I
25 keyed them off the hot tub.

1 Summary judgment, Rule 56 exists. It has its day. The
2 application in a fact intensive case like this -- I'm not
3 prejudging anything. Maybe you'll have a great motion. I
4 don't know. We'll see. The odds are low. Okay? It's just --
5 I mean, you spend your client's money and your time however you
6 want, but, you know, in a place of this type, the idea of
7 getting a summary judgment on a pure issue of law with no
8 genuine dispute of fact on a merits issue is quite unlikely.
9 I'm just saying that based on my long experience in the
10 antitrust field.

11 Now, maybe you'll come up with something, I don't know.
12 But I don't expect summary judgment to be a huge time consumer,
13 at least on my end.

14 So I think two months is a bare minimum, but I can
15 probably make it work.

16 Now, if there are any wrinkles or things we're not
17 anticipating, I will just move the trial date. I'm not going
18 to be rushed. So, but that's an issue for another day.

19 Yes, go ahead.

20 **MR. POMERANTZ:** Your Honor, I know that plaintiff's
21 counsel, class counsel was concerned about the filing of the
22 class certification motion. I get that. And we'll work with
23 them on that.

24 We have a concern --

25 **THE COURT:** Before you do that, I mean, just to jump

1 in. How difficult is that? Is class cert really going to be a
2 huge challenge here?

3 **MR. POMERANTZ:** Oh, yes, Your Honor. Oh, yeah.
4 There will be serious issues raised. I promise you.

5 **THE COURT:** Okay.

6 **MR. POMERANTZ:** There will.

7 **MR. KELLY:** Your Honor, we don't agree that there are
8 serious issues. It's just we are in the middle of depositions
9 that we've had for -- the holidays have delayed our ability to
10 complete it. We've identified a number of depositions we don't
11 need before class certification, but some of them are in
12 process and currently are deadline --

13 **THE COURT:** You don't need me to say this. Remember,
14 the class cert decision is a procedural decision. Does it make
15 sense to proceed as a class? That's really the issue.

16 Now, of course, there are good arguments both ways
17 sometimes, but, you know, we're not looking at merits issues.
18 We're doing merits as *Amgen* counsel's, only to the extent that
19 it's relevant to Rule 23.

20 So I'm not surprising anyone by telling you, as I've
21 written in many recent orders and orders over my time on the
22 bench, it's not a proxy for a trial or summary judgment.

23 So, really, the issue is does it make sense to go to the
24 next stage, the merits stage, on a class basis, which is why I
25 didn't think there would necessarily be tremendous

1 complications, but maybe, you know, Mr. Pomerantz and others
2 would have different views.

3 So that was all then. But anyway, go ahead,
4 Mr. Pomerantz.

5 **MR. POMERANTZ:** I just want to be clear that while
6 the plaintiffs did come to us and ask about moving back the
7 date for filing their class certification motion, we were
8 obviously concerned about what ripple effects that has on
9 things like the expert merits reports and summary judgment.
10 And all of this was worked out together among the parties.

11 And so I would expect that that's what we're going to do
12 between now and January 14th, is to come up with a composite
13 schedule that works for everybody, just like we've done now
14 twice before, and I would expect that we would be able to do
15 that again.

16 We sort of roughly look at *Capacitors* as a guide, as Your
17 Honor has asked us to do, and we'll continue to use *Capacitors*
18 as a rough guide.

19 **THE COURT:** Now, *Capacitors* went for seven years.
20 You're not going to do that. Don't worry about that.

21 **MR. POMERANTZ:** A very rough guide. How is that?
22 We've -- just in terms of the sequencing as opposed to the
23 amount of time.

24 **THE COURT:** Yes.

25 **MR. POMERANTZ:** So, all right. Well, thank you, Your

1 Honor. I think we understand and we will work with plaintiffs'
2 counsel.

3 **THE COURT:** The other issue, Mr. Pomerantz and
4 everyone, is, you know, you need to start taking into account
5 what variations there might be outside of this core set of
6 issues. Okay?

7 So Epic -- you know, Google and Epic have contract issues
8 that are going to be unique to those two parties. You're going
9 to have to think about that and be creative in coming up with a
10 trial structure. All right?

11 So the main point is I want one jury. This is the optimal
12 result. Now, I think we can get there, but you all know a lot
13 more about the case right now than I know. So I'm going to
14 look forward to your guidance. But this is the optimal result.
15 One jury decides in one sitting the core antitrust issues. To
16 me, that is eminently doable.

17 Now, I'm saying that as someone who has not lived with the
18 case and details as you all have. So I would like to get
19 there. If we can't, I'm going to need a good demonstration of
20 why. But I will leave it up to you in the first instance, as I
21 always do, to come up with a group decision on that. Okay?

22 Now, I would like to get it by the 14th. So if that's
23 going to be a problem -- is that a problem? Can we do that?
24 Is that going to be a problem for anybody?

25 **MR. POMERANTZ:** For Google, Your Honor, I think

1 that's doable.

2 **THE COURT:** Okay. Plaintiffs?

3 **MR. KELLY:** It's doable. Yes.

4 **THE COURT:** Epic? Okay, good.

5 Okay. Great. Anything else for today?

6 **MR. POMERANTZ:** No, Your Honor.

7 **MR. GLACKIN:** No, Your Honor.

8 **MS. MOSKOWITZ:** No, Your Honor.

9 **THE COURT:** So you're going to send me some discovery
10 letters then, is that the --

11 **MR. POMERANTZ:** If we can't resolve it, we will send
12 you those letters.

13 **THE COURT:** All right. Good. So we will meet again
14 at our regular scheduled time.

15 All right. Thanks very much everybody.

16 (Proceedings adjourned.)
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CERTIFICATE OF OFFICIAL REPORTER

I certify that the foregoing is a correct transcript from
the record of proceedings in the above-entitled matter.

Debra L. Pas

Debra L. Pas, CSR 11916, CRR, RMR, RPR

Friday, December 17, 2021